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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1922.

No. 763.

MAX HART,

Appellant,

vs.

B. F. KEITH VAUDEVILLE EXCHANGE, ORPHEUM CIRCUIT, INC., EXCELSIOR COLLECTION AGENCY, INC., *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES.

GEORGE WHARTON PEPPER,
MAURICE GOODMAN,
Of Counsel.

The Lawyers Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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MAX HART,
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AGAINST

B. F. KEITH VAUDEVILLE EXCHANGE, ORPHEUM CIRCUIT, INC., EXCELSIOR COLLECTION AGENCY, INC., *et al.*,
Appellees.

October Term, 1922—No. 763.

BRIEF ON BEHALF OF APPELLEES.

The procedure by which this case has reached this Court is correctly stated in appellant's brief, but the facts of the case as they are alleged in the complaint are not in our judgment correctly analyzed or stated by the appellant, resulting in a false basis for his argument and a necessarily false conclusion.

Facts.

Vaudeville—what it is.

"Vaudeville, as the term is used and understood throughout the United States and in the Dominion of Canada, consists of an *entertainment* for hire" upon the stage of a theatre where, in return for an admission fee, the spectators may witness "a number of dissassociated, short performances by actors, acrobats, musicians, singers, dancers, exhibitors, conjurers, athletes and other

entertainers, and high-class vaudeville is vaudeville as above defined, performed by high class artists and acts at theatres having but two performances a day" (Record, pp. 6-7).

In the definition as thus set forth in the complaint the Court will recognize a picture of the ordinary vaudeville entertainment or "show" as presented at the B. F. Keith Theatre in Washington and similar theatres elsewhere. It is *the* business to which every other activity described in the complaint is collateral or tributary.

Each of such "disassociated, short performances" is described in the complaint as an *act* which includes "the performers, scenery, music, costumes and whatever constitutes the act" (Record, p. 8, fols. 14-14½). Appellant's brief, however, omits reference to this definition, veers away from the business so defined and sets up as a new specie of commodity a "vaudeville act" (p. 18), states that "it is the *act* that is contracted for, and not the performers" (p. 26), and that the act occupies the same position as does a motion picture film (p. 32). According to this characterization a performer, with his personality and talents, plus his stage properties is just so much inert matter like a moving picture film, and he and his accoutrement, constitute property.

The complaint describes the vaudeville business as being conducted by six classes of persons: to wit:

(a) *Authors;* (b) *Producers* who organize acts; (c) *Performers* embracing actors, acrobats, athletes, musicians, singers, jugglers, conjurers, and a great many other entertainers; (d) *Managers and personal representatives* who are the agents of those embraced in class b and c; (e) *Booking agents and booking agencies* which arrange contracts between theatre proprietors and performers or the owner of acts; (f) *Theatre proprietors* (Record, pp. 7-8).

Plaintiff's Business.

Plaintiff's business consists of keeping "performers advised of the most desirable places at which they may present their performances" * * * and he conducts "a large business as manager and personal representative of vaudeville performers and acts" and has a "substantial interest in many acts which he has always represented" * * * "has been employed by many of the most successful and best known vaudeville performers to act as their manager and personal representative" * * * and such business consists, among other things, "in contracting with such performers to negotiate for them with the proprietors of theatres and play houses for the employment of such performers by said proprietors; to arrange a series of employments in various countries and cities * * * to furnish such performers with information as to the most available and satisfactory routes of travel * * *." Plaintiff further alleges that many of the performers who have employed his services are "actors, performers, jugglers, conjurers, acrobats and various other kinds of entertainers, operating either alone or what is known as acts or troupes acting together, who as part of their performances have to and do avail themselves of the use of large quantities of scenery, costumes, etc. * * * which they carry with them from place to place and from state to state" * * * and plaintiff "in many instances as a part of his employment has attended to the transportation and shipment of such scenery, costumes, etc." (Record, pp. 9-10). Such being the plaintiff's business the appellant is mistaken when he says at page 18 of his brief: "In this case the defendants are restraining the entire business of dealing in and of contracting for vaudeville acts, and the people complaining (meaning of course the plaintiff)

are in the business of manufacturing and owning such acts and of contracting for such acts in interstate commerce, and are directly injured by the restraint of trade in the very commodity in which they are dealing." Reference to the complaint discloses no allegation of interference with or restraint of vaudeville "acts" or commodities or any attempt to monopolize "acts", etc. (Record, pp. 18-24).

Defendants' Business.

There are three corporate and ten individual defendants named in the complaint. It sets forth the business each is engaged in. The businesses are different and the distinctions are important. Appellant errs in stating at page 2 of his brief that the defendants are corporations. He also errs in there stating that the defendants are engaged in producing vaudeville acts. None of the defendants is a producer of vaudeville acts in any sense of that word. Again appellant falls into erroneous statements of fact, aside from the inconsistency with his previous statement, when he says at the bottom of page 21 of his brief "* * * we find the following facts to be undisputed: Defendants are engaged in the business of acting as middlemen between the owners of vaudeville acts and the owners of vaudeville theatres." The only defendants charged in the complaint to be middlemen are the B. F. Keith Vaudeville Exchange and the Orpheum Circuit, Inc., which are alleged to be booking agencies (Record, p. 14). The defendant Edward F. Albee is alleged to own certain theatres which with other theatres are known as the "Keith Circuit" (Record, pp. 5-6). The defendants Meyerfeld and Beck are alleged to own other theatres known as the "Orpheum Circuit" (Record, pp. 6). These defendants therefore are not middlemen but principals.

The defendants Proctor and Murdock are also alleged to be theatre owners (Record, pp. 11-12).

Defendants Gugler, Jordan, Goodman and Reid Albee and the Excelsior Collection Agency are not alleged to be in the vaudeville business, and the purpose of including them in the complaint is not clear but in any event of no importance on this appeal (Record, p. 4).

The complaint alleges that defendant B. F. Keith Vaudeville Exchange is the agent for the individual defendant-theatre owners and others and as such agent negotiates with vaudeville performers or their personal representatives, such as plaintiff, for the employment of such performers by such theatre owners. It is alleged that as such agent the Keith Exchange has dealt with plaintiff and has engaged and procured contracts for the employment of various performers represented by him. The defendant Orpheum Circuit, Inc., is alleged to bear the same relationship of agency to the theatres owned by Meyerfeld and Beck that the B. F. Keith Vaudeville Exchange bears to the Keith Circuit (Record, pp. 14-15).

Conspiracy is to Restrain Local Business of Theatres.

The complaint sets forth that in November, 1920, defendants entered into a conspiracy and combination for the purpose of unduly restricting competition and obstructing the course of trade then carried on by the "defendants at the aforesaid theatres in the Keith and the Orpheum Circuit", the motive and effect of which was to secure the absolute monopoly of the high-class vaudeville business in the United States. In other words, the conspiracy is alleged to be directed against the theatre business. The complaint alleges the accomplishment of this conspiracy by twenty eight separate overt acts in not one of which are the defendants charged with any interference or attempted interference with property or commodities or any restraint on the man-

ufacture, sale, exchange or interstate movement of properties or commodities. The interferences charged have to do with the purely personal relationship of employment, viz: refusal to employ performers, refusal to deal with plaintiff as an agent, refusal to act as agent for certain theatres which dealt with plaintiff or employed performers for whom plaintiff was agent (Record, pp. 18-24). It is then alleged that defendants contriving to injure plaintiff and his business, refused to employ performers, acts, or entertainers represented by him and refused him admittance to the Keith Exchange, etc. (Record, p. 25), and he alleges that by reason of the fact that his entire life has been devoted to being a personal representative and manager of acts, performers and entertainers he cannot efficiently engage in any other business (Record, p. 26).

While the complaint does not, directly or indirectly, charge the defendants with attempts to control, monopolize, interfere with or restrain the business of manufacturing or trafficking in scenery, costumes, musical instruments or other properties, yet the appellant's brief at pages 17 and 18 contains a very ingenious statement, obviously designed to give the Court that impression, for the appellant in distinguishing this case from the *Baseball* case says "* * * it was not claimed in the baseball case that the defendants unduly control or restrain the traffic in uniforms or balls or bats or any other product of human labor. No person engaged in the manufacture of uniforms, of balls, bats or of any other product of human labor has complained of any misconduct on the part of the baseball club with respect to trade in such commodities." And again referring to the baseball case, appellant's brief continues "* * * but it was not even contended that the defendants prevented plaintiff from freely securing every character of commod-

ity required by plaintiff in its business." As there never has been any claim in this case that the defendants have prevented plaintiff or others from securing stage properties or other paraphernalia the above is quite misleading.

Interstate Feature.

The complaint alleges that the several defendants are engaged in interstate commerce because the contracts of employment, which are made between the theatre owner and the performer and which are negotiated by the booking agencies either directly with the performer or through his personal representative, contemplate and result in the performer traveling interstate and carrying with him needed stage properties (Record, pp. 8, 12, 13). It is not alleged or claimed that every performer requires stage properties. On the contrary, appellant's brief at page 16 concedes "that some vaudeville acts require the use of comparatively few properties." Nor is it alleged (as it is regarding the defendants) that the performer or the personal representative is engaged in interstate commerce.

This, therefore, is a complaint by one who does a brokerage or agency business as personal representative of actors, performers or vaudeville entertainers against certain vaudeville theatre-owners and vaudeville booking agencies. Neither authors, performers, producers or owners of vaudeville acts are involved. Neither is there involved any question of the price, production, supply or transportation of scenery, costumes, commodities or other things used by any one in the vaudeville business.

The Decision of the Trial Court.

Appellant at page 19 errs in stating "the Court further held in effect that since the dominant object of the defendants was to procure materials for use in intrastate vaudeville exhibitions * * * that procuring such material could not be interstate commerce."

The opinion below contains no such statement as the basis of the court's decision in whole or in part and such a ground is not even suggested (Record, pp. 29-30).

Law.

The principle of law enunciated by this Court in the case of *Federal Baseball Club of Baltimore* against *National League*, 259 U. S. 200, squarely covers the facts in this case and the lower court was right in dismissing the complaint herein, upon the authority of that case. The Supreme Court said at page 208:

> "A summary statement of the nature of the business involved will be enough to present the point. The clubs composing the Leagues are in different cities and for the most part in different States. The end of the elaborate organizations and sub-organizations that are described in the pleadings and evidence is that these clubs shall play against one another in public exhibitions for money, one or the other club crossing a state line in order to make the meeting possible. When as the result of these contests one club has won the pennant of its League and another club has won the pennant of the other League, there is a final competition for the world's championship between these two. Of course the scheme requires constantly repeated travelling on the part of the clubs, which is provided for, controlled and disci-

plined by the organizations, and this it is said means commerce among the States. But we are of opinion that the Court of Appeals was right.

The business is giving exhibitions of base ball, which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in *Hooper* v. *California*, 155 U. S. 648, 655, the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.

If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States.

The similarity in the facts of the two cases is striking. Basicly, they are the same. In both cases the ultimate object of the business is the giving of an exhibition for the amusement of the public, one in an amphitheatre, the other in a theatre, and that which is sold to the public in both cases is entertainment; that

which is the subject of the contract between the vaudeville performer and his employer is the performer's skill or ability to entertain, just as it is the subject matter of the contract between the baseball player and his employer. When the vaudeville performer travels from State to State to give his performances, those properties which the performer carries or has transported are not the subject of sale any more than are the baseball bats, masks, gloves, etc., in the case of the baseball player. In neither case is personal effort related to production. The case of Metropolitan Opera Company against Hammerstein, decided at Special Term, in the Supreme Court, in the County and State of New York, and unanimously affirmed by the Appellate Division of that Court in 162 App. Div. 691, and thereafter affirmed without opinion by the Court of Appeals in 221 New York 507, presented the question whether the business of giving grand opera in various cities with the attendant interstate movement of persons and stage properties was interstate commerce. While, of course, not authority in this Court, we cite it, because the opinion is well reasoned and compatible with all the decisions of the United States Supreme Court on this question. The opinion in the lower Court in the Metropolitan Opera Company's case, which in its ultimate affirmance by the Court of Appeals involved the acquiescence of an aggregate of thirteen judges in the three courts, contains the following:

> "The production of opera or other theatrical exhibitions before an audience in exchange for the price of the tickets involves none of the elements of trade or commerce as commonly understood. There is no dealing with an article of trade or commerce nor any use made of any of the instrumentalities of commerce. The holder of the ticket pays a certain price as a consideration for the privilege of experiencing the gratification of an artistic sense. Such a transaction is as far removed as possible from the commonly

accepted meaning of trade or commerce. * * * If the production of opera is not commerce, the fact of its production, sometimes at one place and sometimes at another, does not make it so. If, then the thing or matter directly affected by the covenants in question is not commerce, the fact that incidentally in preparation for, or to enable it to give, the production plaintiff does some acts or enters into transactions of interstate commerce and uses the instrumentalities of interstate transportation, and to that extent is at times engaged in interstate commerce, does not bring these covenants within the provisions of the Act of Congress, for the reason that they do not relate to such acts or activities and the latter are not directly affected thereby. The effect thereon, if there be any, is only incidental, secondary and remote. * * * The fact, if it be a fact, that as a result of this contract the amount of transportation from one State to another might be curtailed or other acts of interstate commerce be in similar indirect manner affected does not bring this contract within the Sherman Anti-Trust Act. Such effect is incidental only and secondary."

We contend that shorn of all fine spun theories, and conclusions of law, the complaint in this case shows that that which is contracted for by the *theatre owner*, that which is booked by the *booking agency*, that which is furnished by the *vaudeville performer* and that which the *public* pays to witness, in short, that in which all the parties concerned deal, and with respect to which which they contract, is the professional services of the vaudeville artist and we use "artist" advisedly, because the complaint in defining vaudeville employs the same term (Record, p. 7). We claim, therefore, that such labor is not commerce at all within the meaning of the Anti-trust laws, and that the interstate movement of the actors, as well as their paraphernalia is but an incidental and secondary feature of the business. As in the baseball business, so in vaudeville it is necessary to lay

out a route or itinerary to which the performer adheres in playing his engagements. The booking agencies, in this case the B. F. Keith Vaudeville Exchange and the Orpheum Circuit, Inc., bring the performer and theatre proprietor together in the execution of the contract, and when a number of these contracts are made they comprise a route over which the vaudeville performer travels, just as in the baseball case the National Commission laid out a route for the baseball clubs and their players to follow. The booking agencies function locally as the complaint alleges in the City of New York. Upon the execution of a vaudeville contract between artist and theatre owner, it is obvious the work of the booking agency ceases. Whether the vaudeville artist performs his contract is a matter wholly between the parties to the contract. It is not even alleged in this case, as it was in the baseball case, that the defendants or one of them arranged and paid for the transportation of the players, and furthermore, in the baseball case the National League purchased some properties or paraphernalia and sold and caused them to be sent interstate to the various baseball clubs. Not that these facts alter the legal conclusion any, but we refer to them as showing that the vaudeville business is even further removed from interstate commerce than baseball. When we examine the activities of each of the six classes of persons who conduct the vaudeville business as alleged in the complaint, we find that none of them is engaged in interstate commerce. FIRST: The authors—their professional work is certainly local. SECOND: Producers of vaudeville acts who are alleged to do the work of carrying out the author's ideas, rehearsing the act until it becomes the production conceived by the author. Our common experience tells us that this is all done in one place. THIRD: The performer, whose profession it is to give a demonstration of his skill or talent at some local entertainment and who even after he has given that, has

parted with nothing from the sum total of his possessions. FOURTH: Managers or personal representatives of the performers, in which class is the plaintiff. Their business is to negotiate for the actor. FIFTH: The booking agents or booking agencies is the next class and this embraces the defendants B. F. Keith Vaudeville Exchange and the Orpheum Circuit, Inc. The business of these booking agencies is exactly the same as that of the Chautauqua lecture bureau referred to in the opinion of Mr. Justice Holmes in the baseball case. They are both agencies through which employment is procured or arranged. The Chautauqua bureau not only books lecturers but also divers stage performers and entertainers just as in vaudeville. Now, suppose such bureau sent out the well known Burton Holmes to lecture over a Chautauqua Circuit. He would have to carry with him or have transported the stereopticon or moving picture apparatus and the film therefor, with which to illustrate his lecture. Would this fact change the status of the lecture bureau? Clearly no. SIXTH: This class embraces theatre proprietors whose business is purely intrastate.

Appellant stresses to the point of absurdity his claim that the contracts between theatre owner and performer are contracts for commodities. If his theory were sound, such contracts could be assigned by the performer and would survive his death. The decisions, however, are many and uniform to the effect that these contracts are purely personal, terminate with the death of the performer and cannot be assigned by him. Our Courts of Equity have therefore, enforced specific performance of negative covenants in such contracts both in the case of stage players as well as baseball players where their services were especially unique.

See

Keith v. *Kellerman*, 169 Fed. 196;
Shubert v. *Rath, et al.*, 271 Fed. 827.

In *Keith* v. *Kellerman* the defendant did a "diving act" in vaudeville, which became well known throughout the country. She required a diving tank, springboard and other scenery and properties. In *Shubert* v. *Rath* the defendants were acrobats and required such property as costumes, rugs, mats and other paraphernalia. Surely the properties in both cases were not the important features of the act.

Not so many years ago the late lamented Sarah Bernhardt played most of the Keith Circuit and carried with her stage costumes, scenery, etc. On appellant's theory the properties were the act and she only an incidental feature of it. And so too with reference to the vaudeville acts referred to by appellant at page 17, in which trained animals and mechanical properties are used,—what would these animals or mechanical properties amount to as an attraction without the trainer or performer to give the exhibition? Take the artist away from these properties and they would become worthless as an attraction, although the artist might still entertain with other properties. Kreisler's violin without Kreisler wouldn't attract an audience. But Kreisler and *any* violin would.

With regard to the defendant theatre proprietors the complaint alleges that they purchase for their own use and have shipped to them for their respective theatres certain scenery and stage properties, but, of course, this does not involve them in interstate commerce any more than does the purchase and interstate shipment of machinery or other equipment to be used at a mine involve the mine operator in interstate commerce.

If we correctly understand the appellant's theory, it is that the defendants have refused to contract with the plaintiff and with vaudeville performers represented by him and that what performers have or possess is a species of property called a vaudeville act, and that as these performers travel interstate and carry certain stage prop-

erties with them the alleged restraint or interference by the defendants is one imposed upon interstate commerce. We think the case of *United Mine Workers of America against Coronado Coal Co.*, 259 U. S. 344, contains the complete answer to that theory, because if, as in the baseball case, the business in which the parties are engaged is the giving of theatrical exhibitions which are "purely state affairs", to use the language of Mr. Justice Holmes in that case, then the restraint on employment of performers, while in some way it may affect the movement of actors or may even affect or reduce the amount of stage properties purchased by them, is not such a direct obstruction of interstate commerce in those properties as is intended to be protected by the Anti-trust law. In the *Coronado Coal* case, it was alleged in substance that the Union and those acting in conjunction with it, in furtherance of a conspiracy to drive non-union coal out of interstate commerce frightened away employees of the coal company, including those directly engaged in shipping coal to other cities, prevented the Coal Company from employing their men and destroyed structures and facilities for handling and shipping coal, interferred with cars of interstate carriers waiting to be loaded, as well as those already loaded with coal intended for interstate shipment and prevented the Coal Company from engaging in or continuing to engage in interstate commerce. This Court said at page 408:

> "Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce. We have had occasion to consider the principles governing the validity of congressional restraint of such indirect obstruction to interstate commerce in *Swift & Co. v. United States*, 196 U. S. 375; *United States v. Patten*, 226 U. S. 525; *United States v. Ferger*, 250 U. S. 199; *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S.

> 563; and *Stafford* v. *Wallace*, 258 U. S. 495. It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint."

And so we contend that if the defendants be guilty of interfering with or restraining anything it is the local business of entertainment or amusement, and not the interstate movement of stage properties or paraphernalia of any kind. That the local business of defendant theatre owners is not interstate commerce is too clear for extended argument.

The intrastate character of the business carried on by the defendants B. F. Keith Vaudeville Exchange and Orpheum Circuit, Inc., may be likened to that in *Hopkins* vs. *U. S.* 171 U. S. 578, although there is in our case no one engaged in dealing in commodities even intrastate. In that case an action was commenced to obtain the dissolution of the Kansas City Live Stock Exchange and to enjoin the defendants from entering into any combination of like character. From the facts stated in the opinion we quote as follows, at page 588:

> "The business of defendants is primarily and substantially the buying and selling, in their character as commission merchants, at the stock yards in Kansas City, live stock which has been consigned to some of them for the purpose of sale, and the rendering of an account of the proceeds arising therefrom. The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the State from other states or from the territories. Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the Kansas City stock yards, is not

the substantial factor in the case. The character of the business of defendants must, in this case, be determined by the facts occurring at that city."

The Court further said at pages 590-591:

"That business is not altered in character because of the various things done by defendants for the cattle owner in order to secure it * * * In this view it is immaterial over how many states the defendants may themselves or by their agents travel in order to thereby secure the business. They do not purchase the cattle themselves; they do not transport them. They receive them at Kansas City, and the complaint made is in regard to the agreements for charges for the services at that point in selling the cattle for the owner. Thus everything at last centers at the market at Kansas City, and the charges are for services there, and there only performed.

The selling of an article at its destination, which has been sent from another state, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, * * * Granting that the cattle themselves, because coming from another state, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade."

As said of the business in the *Hopkins'* case, at page 590, so of the business of these defendants "* * * we must keep our attention upon the real business transacted by them * * *". The business of the Keith Exchange is the local business of furnishing booking office facilities,

and procuring two contracting parties to contract, just like any other broker. In the *Hopkins'* case, the main activities complained of were the alleged restriction as to the persons who might do business at the Exchange and the charge for services at the Exchange. In this case the main complaint is the alleged restraint upon the employment of artists, their personal representatives and the alleged excessive booking commission charged for the purely local service of booking.

The case of *Marinelli* vs. *United Booking Offices*, 227 Fed. 165, cited by the appellant at page 23 of his brief, cannot in the face of the decision of the Supreme Court in the baseball case be considered sound because the Court in that case said "that in travelling from state to state in the performance of theatrical contracts, the performers were fulfilling their contracts as much by travel as by acting" citing the so-called White Slave cases. It did not base its decision on the interstate movement of properties, because it said that this feature was incidental, but it placed its decision squarely on the proposition that contracts between the theatre owner and performer involved for their performance "the transit quite as much as the performance". The conclusion reached by this Court on this very same feature in the baseball case is just the contrary. Furthermore while Congress may have power to expressly regulate concerning any matter of interstate trade or commerce, no matter how remote or incidental, no such statute was involved in the *Marinelli* case, nor is it here. This Court has repeatedly decided that Congress did not intend that the Anti-Trust laws should apply to a business in which interstate commerce is only indirectly or incidentally affected.

Appellant at page 24 of his brief, also quotes from the opinion of the Court of Appeals in the Baseball case, in which it refers to the *Marinelli* case and attempts a distinction between it and the baseball case. We re-

spectfully submit that the reference to the *Marinelli* case is pure dicta, and that the Supreme Court did not necessarily adopt all the reasoning and language of the Court of Appeals in affirming its judgment. The distinction which the Court of Appeals made was that in the *Marinelli* case the entire business consisted in the negotiation of a contract to travel and perform, and that the brokers —in this case the B. F. Keith Vaudeville Exchange and the Orpheum Circuit, Inc.—were not interested in the services rendered or skill exhibited by the performers. Now, if the act of travelling is not interstate commerce within the purview of the statute in so far as the performer and the theatre owner, parties to the contract are concerned, how can the broker be said to be engaged in interstate commerce when he is but the agent in bringing about the contract, and if the brokers, as the Court of Appeals said, were not interested in the services rendered or skill exhibited by the performers, which, of course is the fact, then for this added reason, the brokers are not engaged in interstate commerce, even if the parties to the contract were. If this distinction were sound, then a baseball employment agency or brokerage concern, engaged in introducing baseball players to club owners and bringing them into contractual relations, would be engaged in interstate commerce, though no one else involved in the transaction were.

The case of *Rankin against Associated Bill Posters,* cited by the appellant at page 28 of his brief, is not applicable, because to quote from the opinion itself the purpose of the combination in that case was "to destroy competition and secure a monopoly by limiting and restricting commerce in posters and to enrich the members by demanding non-competitive prices". If in this case it were alleged that the defendants had combined to secure a monopoly by limiting and restricting orders in scenery or other tangible properties, or had interferred with the price supply or flow of such commodity in commerce, the

case would bear an analogy. And so, too, appellant's comparison at page 13 of his brief, between the contract for the *sale* and interstate movement of such entertainment devices as motion picture films, phonographic records and piano player rolls, tangible things bought and sold by the piece, and the contract of employment of a vaudeville performer who sells nothing but only renders a service is without any weight.

The judgment below should be affirmed.

Respectfully submitted,

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